the Louisiana Court declined to consider under its rule that only one rehearing should be granted. Then the intervening defendant for the first time raised the federal question in the assignment of errors filed with the Chief Justice of the Louisiana Supreme Court. The Supreme Court of the United States rejected the contention that the federal question was not timely raised. Quoting this Court (244 U.S. 317, at 320):

> "The question remains whether the writ of error can be maintained. The record discloses the facts but does not disclose the claim of right under the Fourteenth Amendment until the assignment of errors filed the day before the Chief Justice of the State granted this writ. Of course ordinarily that would not be enough. But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard and therefore was not bound to ask a ruling or to take other precautions in advance. • • • It appears that shortly after the Supreme Court had declined to entertain the petition for rehearing the plaintiff in error brought the claim of constitutional right to the attention of the Chief Justice of the State by his assignment of errors. We do not see what more he could have done."

Petitioner Heider submits that failure to raise a statute in defense until the case is on appeal has the same effect as foreclosing one at trial from introducing evidence as to a proposition of fact there ruled immaterial. In each case, a party is deprived of an opportunity to introduce opposing evidence. Thus Petitioner as timely raised the fed-

eral questions in his petition for rehearing as counsel in *Saunders* did in the assignment of errors filed after denial of rehearing.

Missouri v. Gehner, 281 U.S. 313 (1930), involved interpretation of a Missouri statute imposing a tax upon all insurance companies organized under Missouri law. The Missouri Insurance Company made a return pursuant to the statute in which it declared the total value of its personal property to be $448,265, including $94,000 in United States bonds. The legal reserve and unpaid policy claims amounted to $333,486. It deducted such bonds, reserve, and claims, leaving $20,778 as the net value to be taxed. The board of equalization declined to accept the return, and held, after hearing, that the bonds of the United States were not taxable, that the statute contravened sections of the State Constitution, and that therefore, the company was not entitled to deduct the amount of such reserve and claims. The board assessed the company's taxable property at $50,000.

Upon the company's application, the Missouri Supreme Court issued its writ of certiorari. It found the statute valid, that the company's liabilities were chargeable against all its assets, taxable and nontaxable alike, declared that such reserve and claims should be apportioned between the two classes of assets according to their respective amounts, and determined that $90,710 was the net value to be taxed. The company moved for rehearing and urged that the statute violated Art. 1, Sec. 8 of the Constitution, which gives to Congress the power to borrow money on the credit of the United States, and also violated a section of the Revised Statutes, which provides that all United States bonds shall be exempt from taxation by or under state, municipal, or local authority. The Court denied the motion but modified its opinion and found $74,136 to be the taxable net

value. However, the Court made no reference to the federal questions raised. On appeal to the Supreme Court of the United States, the judgment was reversed.

Under the rationale of Respondent Michigan Sugar Company in this case, the Missouri Insurance Company should have invoked the federal claim prior to rehearing in protecting the United States bonds against taxation. But the Supreme Court held otherwise. Quoting the Court (281 U.S. 313, at 320):

> "It is well settled that this court will not consider questions that were not properly presented for decision in the highest court of the State. Ordinarily it will not consider contentions first made in a petition to the state court for rehearing where the petition is denied without more. * * * But here the company, at the first opportunity, invoked the protection of the federal Constitution and statute. It could not earlier have assailed the section as violative of the Constitution and laws of the United States. The board of equalization completely eliminated the bonds from its calculations, and there is nothing in the language of the section to suggest that it authorizes any diminution of the amount of the deductible reserve and unpaid claims or an apportionment of such liabilities between taxable and nontaxable assets. *It may not reasonably be held that the company was bound* to anticipate such a construction or *in advance to invoke federal protection against the taxation of its United States bonds.* Upon the facts disclosed by this record it is clear that appellant sufficiently raised in the highest court of the State the federal question here presented and is entitled to have them considered. * * *" [Emphasis supplied.]

Similarly, in *Ohio v. Akron Park District*, 281 U.S. 74 (1930), this Court assumed that the federal questions were

raised at the earliest opportunity. These were two cases, each brought in the state court by a taxpayer attacking the Ohio Park District Act as being violative of both the State and Federal Constitutions. The validity of the act was sustained by the trial courts and by the intermediate state appellate court.

On appeal to the Ohio Supreme Court, two of the Justices held the statute was valid, while five Justices were of the contrary view. The State Constitution provided that "no law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void". The Ohio Supreme Court accordingly affirmed the judgments in favor of the defendants. Thereupon, motions to vacate the judgments and to enter judgments of reversal, grounded upon the assertion that said Ohio constitutional provision conflicted with the Federal Constitution, were made. The Ohio Supreme Court overruled the motions, and appeals were taken to the Supreme Court of the United States.

With respect to the timely raising of the federal questions, the appellants urged that it would have been speculative for them to raise the question in advance of the decision by the Ohio Supreme Court. This position is similar to that taken by Petitioner Heider in this case—that he should not be required to anticipate in advance of its decision that the Michigan Supreme Court would act in an unconstitutional manner. This Court, in *Akron Park District,* stated (281 U.S. 74, at 79):

> "The question with respect to the validity, from a Federal standpoint, of the provision of the state constitution that no law shall be held unconstitutional

> by the Supreme Court of the State without a concurrence of at least all but one of the judges, except in the affirmance of a judgment of the Court of Appeals declaring a law unconstitutional, was not raised in these suits until after the judgments of affirmance by the Supreme Court. But it is insisted that the point could not have been taken earlier, as in advance of the affirmance on a vote of the minority the question would have been speculative. Hence, it is said that the Federal question was raised at the earliest opportunity. (*Saunders v. Shaw*, 244 U.S. 317, 320.) Assuming that the Federal question is thus brought here, we find it to be without merit."

The Court then proceeded to reject the argument that the provision in question of the Ohio Constitution was in violation of the United States Constitution.

In light of the circumstances attendant here in *Heider*, the Petitioner respectfully submits that he timely raised the federal questions in his petition for rehearing, and that those questions are now properly before this Court for decision.

It appears incongruous to Petitioner that Respondent whose action in raising the statute at the eleventh hour gave rise to this appeal should now challenge as untimely the federal questions raised by Petitioner on rehearing.

II.

THE STATUTE DENIES THE EQUAL PROTECTION OF THE LAWS

Under the common law of Michigan, a trespassing adult can successfully assert a cause of action for damages for injuries sustained while on the land of another if he was injured through the gross negligence or wilful and wanton misconduct of the landowner. *Le Duc v. Detroit Edison Co.*, 254 Mich. 86, at 89, 235 N.W. 832, at 833 (1931). Trespassing minors were treated the same as trespassing adults, *Le Duc v. Detroit Edison Co., supra; Petrak v. Cooke Contracting Co.*, 329 Mich. 564, at 568, 46 N.W. 2d 574, at 576 (1951), despite liberal decisions elsewhere which took their impetus from the famous "turnable case", *Railroad Company v. Stout*, 84 U.S. (17 Wall.) 657 (1873), in which this Court affirmed a judgment awarding damages to a trespassing six year old boy. In the "turnable case" the Court recognized as well settled that the conduct of an infant of tender years is not to be judged by the same rule which governs that of an adult. *Id.*, at 660.

As of 1959 at least 40 States distinguished between trespassing children and adult trespassers, either by adoption of the "attractive nuisance" doctrine or by following Section 339 of the Restatement of Torts, according to Dean William L. Prosser. 47 *Calif. L. Rev.* 427, 432-435 (1959).

A drastic change in the Michigan common law was worked by the decision of *Lyshak v. City of Detroit*, 351 Mich. 230, 88 N.W. 2d 596 (1958). *Lyshak* was later followed by the Michigan Supreme Court in *Swanson v. City of Marquette*, 357 Mich. 424, 98 N.W. 2d 574 (1959), and *Nielsen v. Henry H. Stevens, Inc.*, 359 Mich. 130, 101 N.W. 2d 284 (1960). By virtue of *Lyshak*, trespassing children who are injured through the ordinary negligence of a land-

owner who maintains a dangerous condition on his land may successfuly assert a cause of action if the landowner knows or should know that they trespass thereon.

The statute in question in this appeal, Act 201, worked no change in the common law rights of adults who are injured while trespassing on the land of another for the purpose of fishing, hunting or trapping without paying the landowner a valuable consideration therefor. By its provisions they still must establish gross negligence or wilful and wanton misconduct on the part of the landowner in order to recover. But as construed and applied in *Heider v. Michigan Sugar Co.*, 375 Mich. 490, 134 N.W. 2d 637 (1965), the statute worked a stern change in the common law rights of immature minors, of children of tender years who are injured while trespassing on the land of another for the purpose of fishing, hunting or trapping without paying the landowner a valuable consideration therefor. Under *Lyshak,* such a child injured while on the premises of a landowner such as Michigan Sugar Company, which maintains a dangerous condition on its land and which knows or should know that children trespass thereon, need establish only ordinary negligence. But under Act 201 as construed and applied, a child in the same circumstances must establish gross negligence or wilful and wanton misconduct on the part of the landowner.

The effect of the statute then is to discriminate invidiously between children. A non-paying, trespassing child who drowns because of a dangerous condition on the land while fishing through the ice is denied recovery upon proof of ordinary negligence. But a non-paying, trespassing child who drowns with him at the same pond as a result of the identical negligence of the landowner while skating on the ice is allowed recovery upon proof of ordinary negligence.

What, then, is the alleged reasonable basis asserted in justification of this discrimination? The Respondent suggests that it is because the hunter, trapper and fisherman are armed with "implements of destruction which may be hazardous to the owner or his livestock or fowl." (Brief of Respondent, p. 17.) The Petitioner agrees as to hunters, is skeptical as to trappers, and disagrees as to fishermen.

The Respondent suggests that the Michigan legislature could have thought that stronger deterrents were required because of their "depredations" against those who trespass on the land of others for the purpose of hunting, fishing or trapping than against other kinds of trespassers. Certainly the problem is a genuine one. Perhaps "stronger deterrents" are called for in the case of adult trespassing hunters, trappers and fishermen, but surely there is no reasonable basis for imposing these "stronger deterrents", viz. the invidious discrimination, upon mere children engaged in such activity. And we are talking about mere children here, not adults. This case concerns children of tender years—immature minors—specifically, a boy of eight years and his brother, twelve and a half years of age.

Such striplings are not hunters, trappers and fishermen in the sense that adults are. Rather, they are imitators of adults. They are play-actors who exist in a world of fancy and imagination. Justice Smith put it well when he said in *Lyshak:*

> "* * * We must weigh against the ancient exclusive rights of the landowner the known fact (among others) that although urban children live, physically, in a world in which the stream of traffic has replaced the stream of water, and concrete and asphalt the pasture and meadow, mentally theirs is still a world of fiction and fantasy. Theirs, we know also, is a world in which property rights,

> either personal or real, are obscure, and in which the trespass is the norm. These things we cannot change. They are existing facts, as concrete as the playground itself, and the law must take them into account. * * *" (*Lyshak v. City of Detroit,* 351 Mich. 230, at 242, 88 N.W. 2d 596, at 602.)

Such immature minors as these boys, such children of tender years, do not engage in hunting, trapping and fishing with anything approaching the intensity, frequency and effectiveness of their fathers, nor are their numbers anywhere near as great. Any "depredation" or waste they might happen to commit while so play-acting on the land of another would be minimal. Indeed, in this case one of Respondent's employees testified that Respondent "* * * would like to get rid of the muskrats because they do damage on the ponds * * *" 375 Mich. 490, at 511, 134 N.W. 2d 637, at 645-646.

To saddle these children with such a heavier burden of proof—just because of the nature of their activity—than must be borne by another child who is injured at the same time and place and as a result of the landowner's identical negligence while engaged in activity other than hunting, trapping or fishing, is to work an invidious discrimination and to deny them the equal protection of the laws.

III.

THE PROCEDURE FOLLOWED BY THE MICHIGAN SUPREME COURT DENIED PETITIONER DUE PROCESS OF LAW

Respondent misreads Petitioner's brief when it concludes that Petitioner attempts to create the impression that Respondent deliberately delayed raising the statute until this case reached the Michigan Supreme Court. Petitioner does not express this thought anywhere in his brief nor does he intend to imply it.

Respondent Michigan Sugar Company submits that the Michigan Court, with no contention before it that other facts existed which would bear on the applicability of the statute and without any motion by Petitioner for leave to amend the pleadings, could reasonably rely on the pleadings and record before it in determining whether the statute was to be applied. The short answer to this is that the Michigan Court did have before it on petition for rehearing the submission of Petitioner that facts did exist which would significantly affect the application of the statute to this case, and that the Court, except for two dissenting Justices, paid them no heed. These facts were set forth by affidavit. Further, since the State Supreme Court is an appellate, not a trial court it would have been futile for Petitioner to seek from it leave to amend his pleadings. In the first instance, if Respondent had properly pleaded the statute as a defense at the trial level, Petitioner could have exercised his right to amend his declarations if necessary. But when Respondent so belatedly raised the statute for the first time in its brief on appeal, it presented serious questions as to whether the Michigan Court would pay any attention at all to the statute and,

if so, how it would interpret it in the light of a strong public policy favoring the protection of minors. These crucial questions deservedly received Petitioner's first attention.

The record was replete with references to the fact that the boys were trapping, the Respondent argues. In support, it points to and in some instances quotes from the pleadings, the statements of Petitioner's counsel at pretrial proceedings and later at trial, the testimony of certain witnesses at the trial, and the findings of the trial judge. But this does not dismiss the evidence offered by affidavit on petition for rehearing—that David Heider, age 8, was physically incapable of trapping, owned no traps, and had never trapped (Record, 342-346), and that the testimony established that there were no eyewitnesses to the drownings (Record, 92), and that therefore there existed a question of fact under the statute as to why James Heider, age 12, was upon the Respondent's property at the time he drowned. Moreover three Justices of the Michigan Court concluded that the declarations do not disclose the applicability of the statute to bar Petitioner's causes of action, and that the record as made in the trial court fails to disclose any direct evidence that the boys in fact went upon Respondent's lands to fish, hunt, or trap. Thus, this case calls even more strongly for remand than did the facts in *Saunders v. Shaw,* 244 U.S. 317 (1917). There, the Louisiana Supreme Court first affirmed a judgment for defendant, holding that it was inadmissible for plaintiff to show that his land was not benefited by a drainage tax the collection of which he sought to enjoin. On rehearing, that Court reversed the judgment without affording defendant an opportunity to present his evidence concerning benefit and granted an injunction upon the basis of *Myles Salt Co. v. Board of Commissioners of the Iberia & St. Mary*

Drainage District, 239 U.S. 478 (1916), which was decided subsequent to its original decision. Defendant then petitioned the Louisiana Court for a second rehearing, but this was denied over the dissent of two Justices who voted to remand the case. In reversing the judgment this Court stated (244 U.S. 317, at 319):

> "* * * Probably the majority of the Supreme Court thought that it was so plain on the *uncontroverted facts* that the case was within the principle of *The Myles Salt Company's Case* that to remand it would be an empty form—a mere concession to technicality. It may turn out so, but we do not see in the record an absolute warrant for the assumption and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in." [Emphasis supplied.]

Saunders v. Shaw is discussed further in both Petitioner's first brief and in the brief of Respondent. Petitioner submits that Respondent's attempt to distinguish *Saunders* from this case on the basis of four "basic differences" falls short of the mark. *Firstly*, Respondent states that in *Saunders* the State Supreme Court decided a controverted factual issue without permitting a hearing while in this case there was no contested issue of fact before the Michigan Supreme Court which decided only a question of law. But the Michigan Court decided whether a cause of action had been stated in light of the statute—a question of law— only after resolving questions of fact which brought the statute into application. The questions of fact were determined by reference to the record made in the trial court before Respondent raised the statute on appeal, giving rise to the matter in dispute. Moreover, Petitioner's petition for rehearing in the Michigan Court raised contested issues of fact.

Secondly, Respondent argues that the State Supreme Court in *Saunders* made a finding of fact on an issue as to which the defendant had not been heard, while here Petitioner himself has admitted or established all the relevant facts. Petitioner denies the statement that the allegations of the pleadings and the testimony in the record establish that the boys were on the land to trap without having paid compensation therefor and that Respondent was not guilty of gross negligence or wilful and wanton misconduct. Petitioner submits that the pleadings and record of testimony are altogether silent on these points. Petitioner further submits that any relevant facts admitted or established by him were so admitted or established prior to the time that Respondent raised the statute, and that Petitioner's petition for rehearing put in issue certain relevant facts.

Thirdly, Respondent contends that in *Saunders* the defendant stated an adequate defense which was sustained by the trial court in accordance with the then prevailing law, while here Petitioner never set forth a cause of action because he failed to plead a case within the meaning of an applicable statute which he overlooked. This point represents a superficial attempt by the Respondent to mask its own omission to raise the statute—a matter of defense—in the trial court. Here, Petitioner timely filed these suits, tried them before a judge and jury, received substantial verdicts, and successfully opposed Respondent's motions for new trial. Only after Respondent belatedly raised the statute on appeal did the Michigan Supreme Court decide by divided vote, after examining the pleadings and record as made in the trial court, that no cause of action was stated.

Finally, Respondent states that unlike *Saunders* the decision by the Michigan Court is not based upon a decision of the United States Supreme Court handed down after the trial and after the State Supreme Court had originally spoken, but is based upon a statute enacted long before the trial and on an interpretation of that statute which could have been foreseen by anyone familiar with the statute. Suffice it to say that the statute had been in existence some seven years before the trial of these cases and had never been interpreted by the Michigan Supreme Court. Respondent's statement that the Michigan Court's interpretation of the statute could have been foreseen overlooks the opinion of three Justices of that Court who considered as uncertain whether a minor is a "person" within the meaning of the statute, the word "person" being undefined and subject to construction in the light of a strong public policy favoring the protection of minors.

The Petitioner respectfully submits that upon analysis these four "basic differences" are really not material differences at all and that *Saunders v. Shaw* is applicable because failure to raise a statute in defense until the case is on appeal has the same effect as foreclosing one at trial from introducing evidence as to a proposition of fact there ruled immaterial. In each case, the other party is deprived of an opportunity to introduce evidence in opposition.

The Petitioner submits that the procedure employed by the Michigan Supreme Court in these cases denied him due process of law.

Respectfully submitted,

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